82-1043
No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

A. AIDA KELSAW,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION

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Cases

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QUESTION PRESENTED

Whether the spouse of an injured railroad[1] employee may recover for loss of consortium under the Federal Employers Liability Act.

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[1]Respondent Union Pacific Railroad Company is a wholly-owned subsidiary ultimately of Union Pacific Corporation. Respondent has a number of subsidiaries and affiliates which are wholly owned. The only subsidiaries or affiliates which have any outside ownership are:

Alameda Belt Line
Alton & Southern Railway Company
Brownsville & Matamoros Bridge Co.
Camas Prairie Railroad Company
Galveston Houston and Henderson Railroad Co.
Houston Belt & Terminal Railway Co.
Jefferson Southwestern Railroad Co.
Los Angeles & Salt Lake Railroad Company
Missouri Pacific Corporation
Oakland Terminal Railway
Portland Traction Company
Southern Illinois and Missouri Bridge Co.
St. Joseph Terminal Railway Company
The Ogden Union Railway & Depot Company
The Weatherford Mineral Wells and Northwestern
The Western Pacific Railroad Company
UINTA Development Corporation
Union Pacific Resources Ltd.

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TO THE PETITION**

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case. The opinion of the Ninth Circuit, affirming the Trial Court's dismissal of the Complaint, is reported at 686 F.2d 819.

REASONS FOR DENYING THE PETITION

I.

The Decision Below Is Clearly Correct And Is In No Way A Departure From Usual Judicial Procedure.

The Court of Appeals followed well established precedent and clear statutory language in holding that the Federal Employers Liability Act precludes any claim for loss of consortium by the spouse of an injured railroad employee. The Federal Employers Liability Act, 45 USC § 51, et seq., provides separate and distinctly stated remedies to a railroad employee who has been injured by his employer's negligence, on the one hand, and to listed survivors (including the spouse) of a railroad employee who has been killed by his employer's negligence, on the other. *Michigan Central Railroad v. Vreeland,* (1913) 227 U.S. 59, 65, 33 S.Ct. 192, 57 L.Ed. 417.[2] Under the express language of the statute no remedy was created for the spouse or other dependents of a non-fatally injured employee.

The Ninth Circuit Court of Appeals has previously decided this identical issue in *Jess v. Great Northern Railway Company,* (9th Cir. 1968) 401 F.2d. 535. There the court *en banc* affirmed dismissal of a claim for loss of consortium brought by the spouse of an injured railroad worker, on the ground that the Federal Employers Liability Act barred such a claim. *Jess* was based on *New York Central & Hudson River Railroad Com-*

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[2]The validity of the *Vreeland* analysis was confirmed most recently by this Court in *Norfolk & Western R. Co. v. Liepelt,* (1980) 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689.

pany v. Tonsellito, (1917) 244 U.S. 360, 37 S.Ct. 620, 61 L.Ed. 1194. In *Tonsellito,* this court held that the father of an injured 17-year old railroad worker had no cause of action for the loss of services of his son, because the Federal Employers Liability Act preempted the field and precluded all remedies not expressly included in its coverage.

II.

There Is No Conflict Between The Decision Of The Ninth Circuit Court Of Appeals And Any Other Federal Circuit Court Or State Court.

No court, state or federal, has ever recognized the right of the spouse of an injured railroad worker to bring an action for loss of consortium. The decision of the Ninth Circuit in this case is in accord with the Tenth Circuit, the only other Federal Court of Appeals to have ruled on the matter. *Anderson v. Burlington Northern, Inc.,* (10th Cir. 1972) 469 F.2d 288. In that case, the Tenth Circuit denied recovery on a claim for loss of consortium brought by a spouse both under the Federal Employers Liability Act, and under common law.

III.

The Issue Is Well Settled In This Court And Is Not Sufficiently Important To Warrant Review.

In 1917 in *Tonsellito, supra,* this court held that the Federal Employers Liability Act barred the relative of an injured railroad employee from recovering for loss of services because the act preempted all such common law remedies and limited recovery to the listed statutory beneficiaries. For 65 years railroad cases have been tried and resolved under these principles. Congress, while amending the Federal Employers Liability act in 1939 to modify certain judicial holdings[3] has not changed this aspect of the statute.

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[3]45 USC §§ 51 and 54 were amended by Congress in 1939 to enlarge the scope of the act over nearly all railroad employees, and to restrict the use of assumption of risk as a defense.

The Admiralty decisions relied on by Petitioner have not changed this rule in any way. *American Export Lines, Inc. v. Alvez,* (1980) 446 U.S. 274, 100 S.Ct. 1673, 64 L.Ed.2d 284, created a right of action for loss of consortium in general maritime law only. Admiralty has always been more liberal in its recoveries than other areas of the law due to the unique status afforded maritime employees. However, even in Admiralty this Court has refused to engraft loss of consortium onto statutory remedies which do not provide for it. *Mobil Oil Corp. v. Higginbotham,* (1978) 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581. Thus, *Alvez, supra,* in no way affects the Federal Employers Liability Act, a statutory remedy with no parallel body of common law remedies.

This case involves no issue of constitutional law. It is solely one of statutory interpretation based on well established cases and unambiguous language.

CONCLUSION

The decision below is clearly correct and based upon the express language of the statute and long standing precedent, including prior decisions of this court. There is no conflict between the circuits or with the decision of any state court. The decision does not involve any constitutional or important new federal issue other than mere statutory construction which has been well settled by consistent previous decisions. Therefore, the petition presents nothing for review and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief of Respondent in Opposition to the Petition on Allen T. Murphy, Jr., Attorney for Petitioner, on the 4th day of January, 1983, by mailing at a United States Post Office three correct copies thereof, certified by me as such, contained in a sealed envelope with postage prepaid, to said attorney at his post office address, to wit:

Mr. Allen T. Murphy, Jr.
Richardson, Murphy & Tedesco
210 Century Tower
1201 S. W. 12th Avenue
Portland, Oregon 97205

Dated: January 4, 1983.

Roy P. Farwell
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